Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-906

DAMASCUS COMMUNITY CHURCH,

Appellant,

v.

CLACKAMAS COUNTY, a Political Subdivision of the State of Oregon,

Appellee.

On Appeal from the
COURT OF APPEALS OF THE STATE OF OREGON

MOTION TO DISMISS

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The Appellee moves the Court for an order dismissing the appeal herein on the ground that it is manifest that the decision of the Oregon Court of Appeals is correct and that no substantial federal question is presented by this appeal.

I

STATEMENT OF THE CASE

On or about December 18, 1967, the Clackamas County Planning Commission issued to the Damascus Community Church a conditional use permit to construct a church on property it owns in Boring, Oregon. The property is zoned RA-1, Rural (Agricultural) Single Family Residential; churches and schools are separately listed as conditional uses in that district. Jurisdictional Statement, App. K, p. A40-41. In 1975, the County learned that Appellant was operating a school on the subject property without the necessary conditional use permit. After investigation, the County Planning Director notified Appellant that its use of its property for a school violated the terms of the zoning ordinance and requested that Appellant discontinue that use or apply for a conditional use permit for the school. Appellant then applied for a permit which would have accommodated considerable future student body growth and construction of new buildings. Appellee's Board of County Commissioners denied that permit application and was ultimately upheld by the Oregon Court of Appeals. Jurisdictional Statement, App. B. Subsequently, the County filed suit to enjoin the operation of the school without the necessary permit and Appellant countered with a suit for declaratory judgment, seeking a ruling that the operation of the school was included in the 1967 permit for the church, or alternatively, that enforcement of the zoning ordinance was unconstitutional.

The trial court did not rule on the merits of the County's suit for an injunction, but rather, held in its declaratory judgment order that the school ". . .is an integral and

inseparable part of the Damascus Community Church and, further, that Damascus Community Church's original and current conditional use permit is sufficient to encompass school operation." Jurisdictional Statement, App. C, p. A26. The Oregon Court of Appeals reversed the trial court, holding that the Clackamas County Zoning Ordinance provided separate criteria for placement of churches and schools in certain zones by permit and that the use of Appellant's property for a school is not automatically authorized by a permit allowing its use for a church. Further, the Court held that the ordinance and its application to Appellant's situation does not interfere with Appellant's right to the free exercise of religion since the zoning regulations only impose reasonable limitations upon religious practices and not upon religious beliefs, and that those limitations are designed to protect the public health and welfare. Jurisdictional Statement, App. A, p. A9. On September 3, 1980, the Oregon Supreme Court denied Appellant's petition for review (Jurisdictional Statement, App. H, p. A36), and this appeal follows.

II

ARGUMENT

1. The zoning regulations at issue here are reasonable limitations on the place and manner of practice of Appellant's religious beliefs.

The Appellant contends the zoning ordinance prohibits the church from operating its school without justifying that prohibition by a showing of compelling state interest. That contention fails to raise a substantial federal question.

The compelling state interest test provides that governmental interference with First Amendment freedoms can only be upheld by a showing of compelling reasons justifying the interference. That test has not been applied to reasonable and necessary regulation of religious practices. The zoning ordinance provisions at issue here, and the County's enforcement of those provisions in this situation, are necessary to protect the public's welfare and comprise reasonable governmental regulation of the manner in which Appellant practices its religious beliefs and are not subject to a showing of compelling state interest.

The Court has held the First Amendment prohibits governmental infringement upon religious beliefs. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940). However, the Court has long recognized a distinction between governmental interference with religious beliefs and reasonable regulation of the practice of those beliefs. Reynolds v. United States, 98 U.S. 145 (1879). Even while invalidating a statute affecting freedom of religion, a unanimous court in Cantwell said:

> "No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace,

> good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Cantwell v. Connecticut, supra, 60 S.Ct. at 903.

The Appellant relies heavily on Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 790 (1963), for the proposition that, ". . .the finding of a compelling state interest is requisite to the sustaining of any form of governmental regulation which impinges on the free exercise of religion." Jurisdictional Statement, p. 5. The actual holding in that case is somewhat more narrow. In Sherbert, the Appellant was denied unemployment compensation benefits because she refused to accept suitable work when offered. Her refusal was based on her conscientious objection to work on Saturday, the Sabbath Day of her faith. Speaking for a majority of the Court, Mr. Justice Brennan was careful to note that the statutes at issue directly infringed upon the appellant's religious beliefs, and not upon conduct prompted by those beliefs. Sherbert v. Verner, supra, 83 S.Ct. at 1793. It was that direct infringement that the Court held subject to the compelling state interest test.

This Court has never dealt with whether zoning regulations such as the conditional use permit process at issue here are permissible limitations on the manner of the exercise of First Amentment freedoms. The Oregon Supreme Court directly confronted the issue in Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5 (1958), appeal dismissed, 359 U.S. 436 (1959). In that case, the defendant City Council had denied a permit authorizing construction of a church in a residential zone on the grounds that the proposed

church would create a traffic hazard and congestion in the neighborhood. The plaintiff religious corporation filed for a writ of mandamus, contending, among other things, that the denial was a violation of the Free Exercise Clause. The Oregon Court, relying on Cantwell v. Connecticut, supra; and on Corporation of Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656, 203 P2d 823 (1949), dismissed for want of substantial Federal question, 338 U.S. 805, 70 S.Ct. 78, reh. den., 338 U.S. 939, 70 S.Ct. 342 (1950), held that zoning regulations are among the reasonable limitations on the time, place and manner of religious practice that government has the inherent police power to impose to protect the public health or welfare.

More recently, the Oregon Court of Appeals upheld the local denial of a religious corporation's application for a conditional use permit to build a "retreat center" in a single-family residential district. Christian Retreat Center v. Washington County, 28 Or App 673, 560 P2d 1100 (1977), rev. den., 278 Or 553 (1977). The defendant County Commission found the contemplated use would result in an unacceptable increase in noise and traffic in the area, that the site was too small for the proposed use, and that the "retreat center" would not fulfill the public need for which the "church and accessory uses" designation had been incorporated into the zoning ordinance. On appeal, the Court held the grounds for denial were reasonable limitations upon the religious practices of the religious corporation.

The zoning regulations at issue here are reasonable limitations on the use of Appellant's property and on the practice of Appellant's religious beliefs. Section 1.11 of the Clackamas

County, Oregon Zoning Ordinance, at all times material to this dispute, read as follows:

> "This Ordinance is enacted for the purpose of promoting public health, safety, morals, comfort and general welfare; to conserve, stabilize, and to protect property values; to encourage the most appropriate uses of land; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen traffic congestion, and to facilitate adequate and economical provisions for public improvements, all in accordance with a development plan for the future development of the County, or parts thereof; to provide a method of administration and to prescribe penalties for the violations of provisions hereafter described -- all as authoirzed by the provisions of Sections 215.010 to 215.190, and Section 215.990, Oregon Revised Statutes, and subsequent amendments."

To further those goals, Clackamas County has determined that certain land uses, because of their public convenience and necessity and their effect upon surrounding neighborhoods, should not be outrightly allowed in all zones but should undergo the public hearing process that leads up to a conditional use permit. Among those conditional uses are churches and schools.

Different uses of a single structure may have radically different impacts upon the surrounding neighborhood. A school is a more intense use of Appellant's premises than a church.

Such a use generates more traffic, more noise from playgrounds, and more sewage. The County's enforcement of its zoning ordinance does not operate to deny church members their religious beliefs, but may prevent overuse of the church property in the practice of those beliefs.

The Appellant has never applied for a permit to use its property for the operation of a school in existing buildings and at its current level of enrollment. The proper standards required for this use have never been applied. The Appellant has not shown that the ordinance would operate to preclude the operation of the school at a more acceptable site. The Appellant has not alleged that the County has acted in an arbitrary or capricious manner or has discriminated against the Appellant when compared to other religious organizations or other applicants for conditional use permits. Indeed, to exempt religious organizations from the land use compatibility analysis required of other applicants would favor religious uses of land over secular uses and might, in itself, be in derogation of the Establishment Clause.

The Clackamas County, Oregon Zoning Ordinance and its application to Appellant's property do not unconstitutionally infringe upon the free exercise of Appellant's religious beliefs. The issue raised by Appellant does not state a substantial federal question and this appeal should be dismissed.

2. <u>The separate classification in a zoning ordinance of churches and schools is not "suspect" and is not subject to "strict scrutiny."</u>

Classification is inherent in all zoning. Logic dictates that churches, which normally draw

heavy use on one or two days of the week, merit a land use analysis different from schools. A school is a more intense use of property than a church. Schools generate traffic and noise at least five days a week. Schools require more space. Schools generate more sewage.

The Clackamas County, Oregon Zoning Ordinance draws distinctions among "Churches," "Schools: Parochial and Private," and "Public Schools: Private and Parochial Schools Offering Curricula Similar to Public Schools," and lists them separately as conditional uses in certain zoning districts. The ordinance also separately lists as conditional uses auto wrecking yards, cemeteries, nursing homes, mobile home parks, hospitals, drive-in theaters, and several other special purpose land uses.

Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Federal constitution. American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, reh. den., 416 U.S. 1000, 94 S.Ct. 2414 (1974). Appellant's Jurisdictional Statement cites no authority for the proposition that the zoning regulations at issue here create "suspect classifications." The Appellant has not shown that the zoning regulations at issue here have been applied arbitrarily to its property or that the distinction between churches and schools results in some invidious discrimination. The Court held long ago in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S.Ct. 114 (1926), that zoning regulations bear a rational relationship to permissible state objectives.

The Clackamas County, Oregon Zoning Ordinance and its application to Appellant's property are reasonable, necessary and do not violate the Equal Protection Clause. The issue raised by Appellant does not state a substantial federal question, and this appeal should be dismissed.

Respectfully submitted,

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